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Case No. 83-2158

In The

Supreme Court

Of The United States

October Term, 1983

DELORES DEVINES, *et al.*,
Petitioners,
v.
HENRY W. MAIER, *et al.*,
Respondents.

REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

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The brief of the City of Milwaukee and the other respondents* underscores the reasons why this Court should grant a Writ of Certiorari in this case. The City argues that *Mugler v. Kansas*, 123 U.S. 623 (1889), and its progeny, still govern regulatory taking cases. Petitioners maintain that *Mugler* has been rejected by subsequent cases from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) through the recent cases of *Kaiser Aetna v. United*

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*Brief in Opposition to Petition for a Writ of Certiorari, filed on July 30, 1984. (hereinafter "City's Brief").

States, 444 U.S. 164 (1979) and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Thus, this Court is presented with the important constitutional question of whether a valid police power limitation on a property interest which is reasonable and satisfies due process must necessarily be considered an absolute bar to compensation under the Fifth Amendment.

Relying on *Mugler*, the City unabashedly argues that, even where there is a resulting total and permanent loss of property, if the state has validly exercised its police power under the standards of substantive due process, no compensation is required because no property owner has a right to use that property in a manner which conflicts with a valid exercise of the police power. Such a circular test forecloses analysis of the question whether a regulatory exercise of the police power "goes too far." *See Pensylvania Coal v. Mahon, supra*, 260 U.S. at 415. It also precludes consideration of factors which this Court repeatedly has said must be analyzed in order to determine whether the state has gone so far that compensation is required. These factors include the degree of loss, the character of the government's action, its economic impact and its interference with reasonable investment backed expectations. *See, e.g., Pennsylvania Coal Co. v. Mahon, supra; Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Kaiser Aetna v. United States* 444 U.S. 164 (1979). If these factors are considered under the approach mandated by *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), it is clear that a compensable taking has occured in this case. *See Devines vs. Maier*, 665 F.2d 138 (7th Cir. 1981) *(Devines I)*.

Under these cases, while the legitimacy of the City's exercise of its police power is a sufficient answer to any claim that substantive due process has been violated, it does not govern whether compensation for the loss resulting from such a legitimate exercise of police power is required by the Fifth Amendment. This latter question is governed by the result of an ad hoc inquiry into the factors set forth in *Pennsylvania Coal Co. v. Mahon* and its progeny. Petitioners maintain that when this is done, as was the case in *Devines I*, petitioners are entitled to compensation for the loss of their homes. Their loss is complete and permanent and occurs as the direct result of the City's interference with their reasonable investment-backed expectations.

The record is clear that the City's Housing Code is not enforced by requiring occupants to vacate their homes in every instance in which violations of the Code are found to exist on the premises. Rather, this only occurs when the City exercises its discretionary administrative judgment to determine that the premises are uninhabitable. Thus, tenants in the City of Milwaukee routinely rent premises which have code violations with no expectation that they will be ordered to vacate. Finally, as was found by both *Devines I* and *II*, this exercise of discretion is exclusively the province of the City. Uninhabitability does not and cannot exist until the City, and no one else, determines that a particular set of conditions makes premises uninhabitable. Tenants may not rely on their own judgement as to the uninhabitability of their unit, and if they do so, they do it at their peril. *Posnanski v. Hood*, 46 Wis. 2d 174, 174 N.W. 2d 528 (1970).

As recently as June 26, 1984, this Court once again rejected a government's argument that a regulatory action itself had expunged a property interest and thereby eliminated any liability for the resulting

regulatory taking. *See, Ruckelshaus v. Monsanto Co.*, ___U.S.___, 52 U.S.L.W. 4886 (No. 83 196, June 26, 1984). In that case, the Environmental Protection Agency has argued that its disclosure of trade secret data did not constitute a taking of property because the regulatory statute authorizing the disclosure pre-empted and thus nullified any state law which created the property interest in the first place. As this Court explained, if such an analysis is sound, "... then the Taking Clause has lost all vitality." *ID.*, 52 U.S.L.W. at 4893, quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 165 (1980). Similarly, here the building inspector's regulatory action of deciding that petitioners should not inhabit their homes cannot be insulated from a Fifth Amendment challenge merely by saying that Wisconsin law has eliminated petitioners' property interest. Such expungement of a property interest "is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Id.*

This Court in *Monsanto* reiterated the basic principle that the taking question must be decided not by a set formula — as was done here in *Devines II* — but by an ad hoc factual inquiry into the relevant factors as was done in *Devines I*. *Id.*, 52 U.S.L.W. at 4891. In *Monsanto*, not much of Monsanto's property was taken because Monsanto, in order to take advantage of the economic benefits of registration, had voluntarily submitted the data to the Environmental Protection Agency with an awareness that it could be disclosed. Here, in constrast, because of the wide discretion conferred upon building inspectors by Wisconsin law, petitioners had no basis for knowing beforehand that the inspector would determine that they should not inhabit their houses. If the court of appeals in *Devines II* had conducted the ad hoc, factual inquiry required by this Court's precedents, as it did in

Devines I, it would have concluded that a taking had occured.

Nor can *Texaco, Inc. v. Short*, 454 U.S 516 (1982), be read as requiring the approach taken by the court of appeals in *Devines II*. That case simply cannot be used to justify any disregard for this Court's repeated holdings that a regulatory taking question can be decided only by an ad hoc, factual inquiry into all the relevant factors. Thus, this Court should grant the petition for a Writ of Certiorari to correct the court of appeals' misinterpretation of the holding in *Texaco* in a manner which undermines and conflicts with the long line of regulatory taking decisions from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) through *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) and *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), among others, to *Ruckelshaus v. Monsanto Co.*, 52 U.S.L.W. 4886 (June 26, 1984).

In light of the foregoing and the Petition, petitioners request that a Writ of Certiorari be issued to review the judgment and opinion of the court of appeals.
August 16, 1984.

Respectfully submitted,

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